

***United States Court of Appeals
for the Second Circuit***



REPLY BRIEF

ORIGINAL

75-7273

United States Court of Appeals
FOR THE SECOND CIRCUIT

FELIX MERCED and MODESTA MERCED,

Plaintiffs-Appellants,

against

AUTO PAK COMPANY, L.T.C.,

Defendant-Appellee,

S & C LIQUIDATING CORP., AUTO PAK DIVISION OF FLINCH-
BOUGH PRODUCTS, DIVISION OF GULF & WESTERN SYSTEMS
Co., ALBERT SHAYNE and ARTHUR CONTENT,

Defendants.

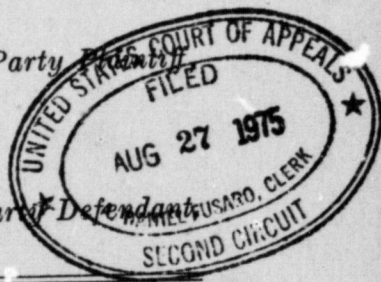
AUTO PAK COMPANY, INC.,

Third-Party Plaintiff

against

SOUTHBRIDGE TOWERS, INC.,

Third-Party Defendant



**REPLY BRIEF ON BEHALF OF PLAINTIFFS-
APPELLANTS**

KATZ, SHANDELL, KATZ, ERASMOUS
and

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**REPLY BRIEF ON BEHALF OF PLAINTIFFS-
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POINT I

**Appellee is liable because it manufactured a
machine that could not be safely operated.**

The liability of appellee in the case at bar does not rest
on the failure to provide safety devices. It rests on the
failure of appellee's machine to function the way it was

supposed to, namely automatically, and not requiring constant manual attendance, creating dangers to the operator not contemplated by the design of the machine.

In such a case liability is not excluded by *Campo v. Scofield*, 301 NY 468.

The authorities and arguments relied upon by appellee in its brief make this all the more apparent. Although appellee nowhere meets head on our argument that an actionable defect exists because the machine didn't function as intended, it attempts to do so by indirection. For instance, at Page 7 of its brief, *Tatik v. Miehle-Goss-Dexter Inc.*, 23 N.Y.2d 828 affirming 28 A.D.2d 1111, is said to involve a machine "which had not been operating properly and which due to this malfunction caused his [plaintiff's] hand to be thrown into a position where it got caught in the rollers and injured."

In the *Tatik* case, *supra*, however, the Court could not dismiss the case until it had explicitly rejected the notion that the machine functioned improperly. The Appellate Division said at P. 1111-1112:

"His testimony was that due to some change of speed his left hand was drawn or thrown directly into the machine. . . . The change of speed . . . had allegedly occurred on one or two previous occasions. The persons to whom plaintiff testified he reported such occurrences were present in court but were not called by plaintiff to testify."

The Court having rejected the idea that the machine had malfunctioned was only then able to distinguish *Beckhusen v. E. P. Lawson Co.*, 9 N.Y.2d 726. The Court said:

"This case may be distinguished from *Beckhusen v. Lawson Co.*, 9 NY2d 726 in what the Court of Appeals rules that there was negligent design of a dangerous instrumentality and a failure to warn of a foreseeable

hazard or at least the jury could find. *Here the rollers operated in the customary manner in accordance with the purpose for which they were designed.*" (Emphasis supplied)

Thus, in the one New York case, which appellee suggests involves a malfunctioning machine, we find explicit affirmance of appellants' contention that the *Campo v. Scofield* rule of non-liability applies only to a properly functioning machine.

Appellee has reached far into out of state decisions to find cases that offer some semblance of similarity to the one at bar in which there was a dismissal as a matter of law. The reasoning of these cases also supports appellants' contention that dismissal is justified only when the machine functions properly.

In *Kerber v. American Machine and Foundry*, 411 F.2d 419, the plaintiff, a bakery employee, reached into a moving belt to correct a stuck dough ball and was injured. Stuck dough balls called "stick ups" and another condition called "doubles" were anticipated in the design of the machine and a safe place at the rear of the machine was provided for their removal. The Court stressed this saying "there was a perfectly safe place to remove the 'doubles' at the rear of the machine."

Appropriate Missouri law provides that a manufacturer has "satisfied the laws demands" with regard to the manufacture of a machine "where its normal functioning creates no danger not known or appreciated by the user; where it is properly manufactured to accomplish the function for which it is designed." *Stevens v. Durbin-Durco*, 377 S.W.2d 343 (Mo. S. Ct. 1964) cited with approval in *Kerber v. American Machine and Foundry*, *supra*, at P. 421: In Missouri as in New York, a manufacturer does not escape liability unless his machine functioned properly for the purpose for which it is designed.

Dismissal in the *Kerber* case, *supra*, turned on the fact that plaintiff ignored a "perfectly safe" place to remove the doubles and unnecessarily exposed himself to danger. In the case at bar, there was no safe way to break up bridging. The machine, though it was supposed to be automatic, had to be manually fed by the operator.

Tomicich v. Western-Knapp Engineering Company, 423 F.2d 410, heavily relied on by appellee (Appellee's Brief, 10, 14), illustrates clearly the error into which the court below fell when it dismissed this case and highlights the factual and legal reasons why appellee's reliance on the *Tomicich* case is misplaced. In *Tomicich*, *supra*, the conveyor belt at which the plaintiff worked tended to accumulate mud. The plaintiff attempted to clean the mud from the conveyor belt by inserting a piece of angle iron into the machine to scrape the surface of the belt while the machine was running. He caught his arm and lost it. Appellee relies heavily on *Tomicich* because in *Tomicich*, as in the case at bar, the plaintiff's excuse was that if he stopped the equipment before cleaning it, it would take a much longer time. Both the court below and the appellee have viewed the case at bar as involving the exact same operative facts as the *Tomicich* case. The trial court regarded the case at bar as one in which there were occasional blockages of garbage that had to be cleaned away. The trial court said "put differently, the established fact that blockages of garbage *occasionally* occur does not indicate that the machine itself was defective" (Emphasis supplied.)

We have pointed out in our main brief (p. 29) that there was proof that the process was *continuous*, requiring *continual* use of the stick (262a, 263a) and that appellee's own witness admitted that the necessity to break up blockages with the stick occurred so frequently that if the machine were turned off each time it happened, a two hour job could not be completed in five (751a, 725a). The

physical layout of the machine with the on/off switch as close at hand as appellee suggests it is (Appellee's Brief, p. 2), would lead to the conclusion that if having to turn the machine on and off would extend the time in performing the work to be done two and a half fold, the necessity must have arisen pretty much on a continuous basis. The jury, in fact, found the occurrence was so frequent that the machine "could not function as automatic" (17a).

The court below, without warrant in law, rejected this finding that the machine could not function as automatic and substituted his own finding of occasional blockages.

If one accepts the jury's finding that the machine "could not function as automatic", then the case at bar falls plainly outside of the *Tomicich* case. The reason for this is that in *Tomicich* the court stated as the basis for its decision in distinguishing *Wagner v. Larson*, 136 N.W.2d 312 (relied on by appellant herein at p. 38 of our main brief), that "the only way to start a loader, which frequently stuck, was to pull it from the front with the power on. In our case, there were safe ways to clean the sheave."

If, as the jury concluded, the machine in the case at bar "could not function as automatic", then there was no safe way of operating it, since it would have to be manually operated. The *Tomicich* case, *supra*, therefore, plainly illustrates how the trial court had to change the operative facts from that which the jury found in order to place the case at bar within the area of immunity from liability carved out by *Campo v. Scofield*, *supra*.

In the case at bar, the jury decided that there was, in fact, a "defect" in this supposedly automatic machine based partly on defendants' expert's concession that if the machine operated as testified by both plaintiff's and defendants' witnesses the purchaser should "get his money back." The jury thus resolved the question of "defect".

Obviously many machines can be made safer by adding additional safety devices but New York law rejects the absence of such devices as a basis for liability. The jury was so instructed but nevertheless found that the product was "defective" in other ways.

This machine certainly needed additional safety devices but this in no way bars plaintiff from asserting that the machine was defective in other ways. Black letter law mandates that "A manufacturer of a product which is reasonably certain to be dangerous or defectively made owes a duty to exercise reasonable care in the manufacture of his product so that it will be reasonably safe for its normal use." New York Pattern Jury Instructions 2:120 (2nd Ed. p. 346).

This machine was defective because it didn't work the way it was supposed to and was, as a result, reasonably certain to be dangerous.

Respectfully submitted,

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and
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United States Court of Appeals
For the Second Circuit

Felix Merced and Modesta Merced
Plaintiffs-Appellants

against
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Defendant-Appellee

S & C. Liquidating Corp. Auto Pak Division of Flinch-
Bough Products, Division of Gulf & Western Systems Co.,
Alert Shayne and Arthur Content,
Defendants

Auto Pak Company Inc.,
Third Party Plaintiff
against
Southbridge Towers Inc.,
Third Party Defendant

AFFIDAVIT
OF SERVICE

STATE OF NEW YORK,

COUNTY OF NEW YORK, ss:

Raymond J. Braddick,

agent for Katz Sandell Katz Erasmus & Marie M. Lambert being duly sworn,



deposes and says that he is over the age of 21 years and resides at

Levittown, New York

That on the 27th. day of

August

, 1975

he served the annexed

Reply Brief

upon

1. Morris Zweibel Esq.
c/o Crowe, McCoy, Agoglia & Zweibel
~~60 East 80 East~~ 80 East Old Country Road
Mineola,, New York
2. Morris, Duffy Ivone & Jensen Esqs.
233 Broadway
New York, New York

in this action, by delivering to and leaving with said attorneys

three true copies to each thereof.

DEPONENT FURTHER SAYS, that he knew the persons so served as aforesaid to be the persons mentioned and described in the said action.

Deponent is not a party to the action.

Sworn to before me, this 27th...

day of August, 1975

} *Raymond J. Bradlock*

Roland W. Johnson
ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1977